91-1058

Supreme Court, U.S.
FILED
DEC. 17 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No.

MARK SPROULL,

Petitioner,

vs

UNION TEXAS PRODUCTS CORPORATION,
D/B/A UNION TEXAS PETROLEUM,
A DELAWARE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JAMES CRAIG DODD OBA #2388
Counsel of Record
of
Craig Dodd & Associates
1017 South Van Buren
P.O. Box 3126
Enid, OK 73702
(405) 242-3009

Attorney for Petitioner

December 18, 1991

QUESTION PRESENTED

Whether a Court of Appeals may abrogate certain discretionary authority afforded Federal District Courts under the Federal Rules of Civil Procedure and replace it with an inflexible rule by holding that post-decisional changes in law may never serve as the basis for granting relief from judgment under Federal Rule of Civil Procedure 60(b)(6) regardless of how extraordinary may be the circumstances associated with the post-decisional change in law.

PARTIES

The caption of the case contains the names of all the parties.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 4

I. THE DECISION BELOW IS NOT ONLY IN DIRECT CONFLICT WITH CONTROLLING DECISIONS FROM EVERY OTHER UNITED STATES COURT OF APPEAL DECIDING THE ISSUE, IT IS IN CONFLICT WITH THE MOST RECENT PUBLISHED DECISIONS OF THE TENTH CIRCUIT COURT OF APPEALS, ALL OF WHICH FOLLOW THE RULE THAT A POST-DECISIONAL CHANGE IN LAW MAY JUSTIFY GRANTING 60(b)(6) RELIEF WHERE THE POST-DECISIONAL CHANGE IN LAW IS FOUND TO BE COUPLED WITH UNUSUAL OR EXTRAORDINARY CIRCUMSTANCES 4

CONCLUSION 7

CERTIFICATE OF SERVICE 8

APPENDIX:

Order and Judgment of the Court of Appeals for the Tenth Judicial Circuit (Sept. 18, 1991) A-1

Order of United States District Court for the Western District of Oklahoma Granting Motion to Set Aside Judgment (Jan. 19, 1990) A-1

Order of United States District Court for the Western District of Oklahoma Vacating Order of January 19, 1990, and Upon Reconsideration Denying Plaintiff's May 31, 1989, Motion to Set Aside Judgment (August 3, 1990) A-11

Fed.R.Civ.Pro. Rule 60. Relief from Judgment or Order A-14

TABLE OF AUTHORITIES

Cases — Page(s)

Adams v. Merrill Lynch Pierce Fenner and Smith, 888 F.2d 696 (10th Cir. 1989) 5

Allstate v. Michigan Carpenters Coun. H. & W. Fund, 760 F. Supp. 665 (W.D. Mich. 1991) 5

Bailey v. Ryan Stevedoring Co., Inc., 894 F.2d 157, (11th Cir. 1990) 5

Ben Hur Const. Co. v. Goodwin, 116 F.R.D. 281, *aff'd*, 855 F.2d 859 5

Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989) 2,6,7

Collins v. City of Wichita, Kansas, 254 F.2d 837 (10th Cir. 1958) 5

Cox v. Wyrick, 873 F.2d 200 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 105, 107 L.Ed.2d 68 4

First American National Bank of Nashville v. Bonded Elevator, Inc., 111 F.R.D. 74 (W.D. Ky. 1986) 5

Foster v. Atlas Life Ins. Co., 154 Okl. 30, 6 P.2d 805 [1932] 1

Hinson v. Cameron, 742 P.2d 549 (Okla. 1987) 1

Matarese v. Lefevre, 801 F.2d 98 (2nd Cir. 1986), *cert. denied*, 480 U.S. 908, 94 L.Ed.2d 523 5

Cases — Page(s)

McGrath v. Potash, 199 F.2d 166,
(D.C. Cir. 1952) 5

Nunnery v. Barber, 23 Fed. R.Serv.2d 232
(4th Cir. 1977) 5

In Re Pacific Far East Lines, Inc.,
889 F.2d 249 (9th Cir. 1989) 5

Polites v. United States, 364 U.S. 426,
5 L.Ed.2d 173, 81 S.Ct. 202 (1960) 4

Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987)
reh'g. denied, 817 F.2d 761, *cert. denied*,
483 U.S. 1010, 97 L.Ed.2d 747 4

Romero v. City of Pomona, 883 F.2d 1418,
(9th Cir. 1989) 5

Tomlin v. McDaniel, 865 F.2d 209
(9th Cir. 1989) 5

Watson v. Simmons Corp., 121 F.R.D. 351
(N.D. Ill. 1988) 5

Wilson v. Al McCord, Inc., 858 F.2d 1469
(10th Cir. 1988) 5

Other Authorities

Fed.R.Civ.P. Rule 60(b)(6) ..... Passim

JURISDICTION

The Opinion of the Court of Appeals for the Tenth Judicial Circuit was entered on September 18, 1991. No Petition for Rehearing was filed. The ninety (90) day period within which to file a Petition for Writ of Certiorari in this Court will run on Wednesday, December 18, 1991. This Petition for Writ of Certiorari was filed within that date. This Court's jurisdiction is established under 28 U.S.C. §1254 (1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Fed.R.Civ.Pro. Rule 60 (b) (6).

STATEMENT OF THE CASE

From statehood in 1907 and continuously thereafter, Oklahoma Jurisprudence recognized the so-called at-will employment doctrine.[1] But in 1987, the Oklahoma Supreme Court indicated its readiness to consider adopting certain nationally recognized public policy exceptions to the at-will employment doctrine.[2] It was this potential dramatic evolution in Oklahoma's employment law that led the Petitioner to file a wrongful discharge action in the Federal District Court for the Western District of Oklahoma.

This action was filed with the hope that the Federal District Court would certify an appropriately framed question to the Oklahoma Supreme Court for the purpose of determining whether, under the circumstances of the Petitioner's case, Oklahoma would recognize an exception to the at-will employment doctrine. Doc. 119. However, the court denied Petitioner's request to certify on February 12, 1988. Doc. 120.

---

[1] *Foster v. Atlas Life Ins. Co.*, 154 Okl. 30, 6 P.2d 805 (1932). The at-will rule stands for the proposition that an employer may discharge an employee for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong.

[2] *Hinson v. Cameron*, 742 P.2d 549 (Okla. 1987) at 552.

[3] *Sproull v. Union Texas Products Corp. d/b/a Union Texas Petroleum*, Grant County Dist. Ct. Case No. C-88-25. Doc. 15 p. 2 §7.

Following the court's refusal to certify, the Petitioner dismissed his case in order to pursue the action in state court thereby enabling Petitioner to take a direct appeal to the Oklahoma Supreme Court. Accordingly, on April 25, 1988, the Petitioner refiled his action in State Court. [3]

However, the Respondent blocked this effort by forcing the Petitioner back into the same Federal District Court that, barely three months before, had denied his effort at certification. The Respondent accomplished this blocking action by removing the Petitioner's state action to federal court on diversity grounds. Doc. 15 p. 2 §7.

It was not possible for Petitioner to argue for a change in state law in federal court. Oklahoma employment law was clear. Accordingly, Petitioner had no other choice but to dismiss his action following its successful removal to federal court by Respondent. Doc. 15, Ex. "F". The second dismissal operated as an adjudication on the merits.

Barely eight (8) months following Petitioner's second dismissal, the Oklahoma Supreme Court promulgated a landmark decision in which it followed the modern trend in employment law.

> " We thus follow the modern trend and adopt today the public policy exception to the at-will termination rule .... We recognize this new cause of action in tort."

Burk v. K-Mart, 770 P.2d 24 (Okla. 1989) at 28.

Because Petitioner's case closely paralleled the facts in *Burk*, the Petitioner promptly filed a motion in the Federal District Court seeking relief under Rule 60(b)(6).

The District Judge determined to grant Petitioner's Rule 60(b)(6) motion not because there had merely been a post-judgment change in decisional law, but because the court found that the change in decisional law was associated with extraordinary circumstances justifying relief. The court held,

> "[A] change in decisional law may be a basis for Rule 60(b) relief if a court, in its discretion, finds extraordinary circumstances that justify such a relief.
>
> In the case at bar, such extraordinary circumstances do exist.... based upon [Petitioners'] attempt at certification and his subsequent attempt to litigate his claim in state court, this Court finds *that justice is best served* by GRANTING Sproull's Rule 60 (b) (6) Motion to Set Aside the Judgment of the second voluntary dismissal.

Doc. 23, p. 5 (emphasis supplied).

Thereafter, Respondent filed a motion to reconsider arguing that the District Judge had no discretionary authority to grant 60 (b)(6) relief, regardless of the existence of extraordinary circumstances. Doc. 34, p. 3.

The District Judge concluded that controlling precedent deprived him of the discretionary authority necessary to give expression to the extraordinary circumstances established by Petitioner in his 60 (b)(6) motion. Having determined he had no discretionary authority, the District Judge granted Respondent's motion to reconsider, reversed himself and denied the 60 (b)(6) motion he had previously granted.

On appeal, the Tenth Circuit Court of Appeals, confirming the inflexible rule that the District Judge had grudgingly followed, held,

> "The law in this Circuit is clear. A post-judgment change in the law or in the judicial view of an established rule of law does not justify relief under Rule 60 (b)(6)."

Appendix, p. A-3 .

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS NOT ONLY IN DIRECT CONFLICT WITH CONTROLLING DECISIONS FROM EVERY OTHER UNITED STATES COURT OF APPEALS DECIDING THE ISSUE, IT IS IN CONFLICT WITH THE MOST RECENT PUBLISHED DECISIONS OF THE TENTH CIRCUIT COURT OF APPEALS, ALL OF WHICH FOLLOW THE RULE THAT A POST-DECISIONAL CHANGE IN LAW MAY JUSTIFY GRANTING 60(b)(6) RELIEF WHERE THE POST—DECISIONAL CHANGE IN LAW IS FOUND TO BE COUPLED WITH UNUSUAL OR EXTRAORDINARY CIRCUMSTANCES.

In *Polites* v. *United States*, 364 U.S. 426, 5 L.Ed.2d 173, 81 S.Ct. 202 (1960), this Court declined to decide the question now presented.

> "[W]e need not go so far here as to decide that when an appeal has . . . not [been] taken because of a clearly applicable adverse rule of law, relief under Rule 60(b) is inflexibly to be withheld . . . ."

364 U.S. at 433.

It is time for the Court to now decide this question. Under a variety of factually disparate circumstances the question has been addressed repeatedly since *Polites* by the Courts of Appeals. And with the exception of the Court of Appeals for the Tenth Judicial Circuit, the Courts of Appeals have been unanimous in their conclusion that a post-decisional change in law may be held to justify granting a party 60(b)(6) relief if the post-decisional change in law occurs under circumstances that are found to be extraordinary. *See*, e.g., *Cox* v. *Wyrick*, 873 F. 2d 200 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 105, 107 L. Ed. 2d 68; *Ritter* v. *Smith*, 811 F. 2d 1398 (11th Cir. 1987),

reh'g. denied, 817 F. 2d 761, *cert. denied*, 483 U.S. 1010, 97 L. Ed. 2d 747; *Matarese v. Lefevre*, 801 F. 2d 98, (2nd Cir. 1986), *cert. denied*, 480 U.S. 908, 94 L.Ed.2d 523; *Nunnery v. Barber*, 23 Fed.R.Serv.2d 232 (4th Cir. 1977) (if change in law had been retroactive, as was the change in law in this case, relief would have been granted); *McGrath v. Potash*, 199 F.2d 166 (D.C. Cir. 1952). Accord: *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989); *In Re Pacific Far East Lines, Inc.*, 889 F.2d 249 (9th Cir. 1989).*See*, also *Allstate v. Michigan Carpenters Coun. H. & W. Fund*, 760 F. Supp. 665 (W.D. Mich. 1991); *Watson v. Simmons Corp.*, 121 F.R.D. 351 (N.D. Ill. 1988); *Ben Hur Const. Co. v. Goodwin*, 116 F.R.D. 281, aff'd, 855 F.2d 859; *First American National Bank of Nashville v. Bonded Elevator, Inc.*, 111 F.R.D. 74 (W.D. Ky. 1986).

Indeed, the decision below is in direct conflict with the most recent published decisions of the Court of Appeals for the Tenth Judicial Circuit. *Adams v. Merrill Lynch Pierce Fenner and Smith*, 888 F.2d 696 (10th Cir. 1989); *Wilson v. Al McCord. Inc.*, 858 F.2d 1469 (10th Cir. 1988).

Most Circuit Courts of Appeal have concluded that a post-decisional change in law, by itself, does not justify Rule 60(b)(6) relief. *See*, e.g., *Bailey v. Ryan Stevedoring Co. Inc.*, 894 F.2d 157, (11th Cir. 1990), *cert. denied*, 111 S.Ct. 89, 112 L.Ed.2d 61; *Tomlin v. McDaniel*, 865 F.2d 209 (9th Cir. 1989). But in the Tenth Judicial Circuit it is of no consequence how exceedingly extraordinary the circumstances may be that are associated with a post-decisional change in law; Rule 60(b)(6) relief may never be granted. *Collins v. City of Wichita, Kansas*, 254 F.2d 837 (10th Cir. 1958).

Thus, the rule continued below requires that the District Judges within the Tenth Judicial Circuit put on blinders when confronted with a motion seeking 60(b)(6) relief that is bottomed on a post-decisional change in law, regardless of how extraordinary the circumstances may be that touch and concern the post-decisional change in law.

The rigid and uncompromising nature of this rule operates as an irrevocable guarantee that justice will not be served in those

circumstance where a post-decisional change in law has arisen in uniquely unusual or extraordinary circumstances.

There is no sense to this rule. While it is true that finality in litigation is an important consideration in the proper administration of justice, the overarching consideration should be to serve justice.

The Petitioner does not disagree with the proposition that a post-decisional change in law, without more, does not justify 60(b)(6) relief. But when there is more, that is to say when a post-decisional change in law is coupled with what are found to be unusual circumstances, the trial judge should be free to exercise the discretion afforded him or her under Rule 60(b)(6).

The court below attempted to take the edge off the harsh rule it followed by claiming that the Petitioner could have appealed his contract and intentional infliction of emotional distress claims following removal to federal court, reasoning that the appeal would probably have been pending when *Burk v. K- Mart* (supra) was decided. The court was just simply wrong.

The Petitioner's contract and intentional infliction of emotional distress claims were inextricably intertwined with the wrongful discharge claim. The Petitioner's employment contract claim was based on an employment contract of indefinite duration. An employment contract of indefinite duration is subject to the at-will employment doctrine. *Hinson v. Cameron* (supra) at 552 and 552 n. 6. Thus, unless and until the Oklahoma Supreme Court set aside the at-will doctrine, Petitioner had no contract claim.

As for Petitioner's intentional infliction of emotional distress claim, that claim also was not viable unless and until the Supreme Court set aside the at-will employment doctrine. This result obtains because the doctrine states that the employer may discharge an employee for good cause, for no cause, "or even for cause morally wrong, without being thereby guilty of legal wrong." *Burk v. K-Mart Corp.*, (supra) at 26. The same facts that supported Petitioner's wrongful discharge claim supported his intentional infliction of emotional distress claim. Until the at-will doctrine was set aside, there was no wrongful discharge and hence, no intentional infliction of emotional distress.

If there had been any argument that the Petitioner could have made in good faith, consistent with Federal Rule of Civil Procedure Rule 11, the Petitioner would certainly have taken an appeal following his removal to federal court.

The Petitioner made every possible effort to take his claim before the Oklahoma Supreme Court. That effort was thwarted by the Respondent when it forced Petitioner back into federal court. Had the District Judge granted Petitioner's original request to certify, he would have enjoyed the benefit of *Burk v. K-Mart* (supra). These facts were viewed by the District Judge as extraordinary circumstance justifying 60(b)(6) relief. But because *Collins* deprived the trial judge of his discretionary authority he had no choice but to reverse himself.

The trial judge's decision to grant 60(b)(6) relief could have been successfully maintained in virtually any federal district court outside the Tenth Judicial Circuit. But here, because the trial judge was deprived of his discretionary authority, he was unable to render the decision that best served justice.

CONCLUSION

For the reason set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Judicial Circuit.

DATED this 18th day of December, 1991.

Respectfully submitted,

James Craig Dodd OBA #2388
of
Craig Dodd & Associates
1017 South Van Buren
P.O. Box 3126
Enid, OK 73702
(405) 242-3009

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 1991, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the following:

Linda Martin
Doerner, Stuart, Saunders, Daniel & Anderson
320 5. Boston Avenue, Suite 500
Tulsa, OK 74103
Counsel for Respondent

I further certify that all parties required to be served have been served.

James Craig Dodd

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARK SPROULL,

Plaintiff-Appellant,

v.

UNION TEXAS PRODUCTS CORP.,d/b/a UNION TEXAS PETROLEUM, a Delaware Corporation,

Defendant-Appellee

No. 90-6286
(D.C. No.CIV-88-891P)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before ANDERSON, TACHA AND BRORBY, Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34 (a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

The sole issue to be decided is whether a post-judgment change in the law justifies relief from a judgment or order under Fed.R. Civ. P. 60 (b) (6). We hold it does not and affirm.

The facts are simple and undisputed. Mr. Sproull (Plaintiff) commenced a wrongful discharge action against his employer, Union Texas Products Corporation (Defendant), alleging he had been denied a promotion and then discharged solely on the basis that he had attempted to report life threatening safety violations

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R.

at his place of employment. Plaintiff also set forth two additional claims for relief: emotional distress and breach of contract. Plaintiff originally commenced this action in federal court, based upon diversity of citizenship. At that time, Oklahoma, the forum state, followed the at-will employment doctrine. An employer could fire an at-will employee for no reason, with no liability. Plaintiff therefore filed a motion to certify a question of state law to the Oklahoma Supreme Court; i.e., would Oklahoma recognize an exception to this doctrine? This motion was denied and Plaintiff voluntarily dismissed the original action.

Plaintiff refiled the same action in state court. Defendant removed the state court action to the federal court, where it was again assigned to the same judge who had a few months before denied the motion to certify a question of state law. Plaintiff voluntarily dismissed this action for the second time. Under Fed. R. Civ. P. 41 (a), the second voluntary dismissal operated as an adjudication upon the merits.

Approximately eight months after the federal district court entered its final judgment, the Oklahoma Supreme Court decided Burk v. K-Mart Corp., 770 p. 2d 24 (Okla. 1989). In Burk, the Oklahoma Supreme Court recognized for the first time a public policy exception to the employment at-will doctrine, allowing recovery where the discharge "is contrary to a clear mandate of public policy . . ." Id. at 28.

Some three months thereafter, being exactly one year after entry of the final judgment, Plaintiff returned to his second action and filed a "Motion to Vacate and Set Aside Judgment" under Rule 60 (b)(6) based upon the post-judgment change in Oklahoma law as articulated in Burk. Following various proceedings, the district court ultimately denied Plaintiff's motion to vacate, holding that its power to grant a Rule 60 (b)(6) motion was not unfettered, especially where the post-judgment change in law arose in a totally unrelated case. The district court relied upon Morris v. Adams-Millis Corp., 758 F. 2d 1352 (10th Cir. 1985), in reaching its decision. Sproull v. Union Texas Products Corp., No. CIV-88-891-P (W.D. Okla. Aug. 3, 1990) (Order upon reconsideration denying Plaintiff's motion to set aside judgment).

As Rule 60 (b) provides "the court may relieve a party . . .from a

final judgment" (emphasis added), it follows that such act is discretionary. Thus, out standard of review in an appeal from a district court's denial of a Rule 60 (b) motion is that of abuse of discretion. Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 263 n. 7 (1978); Graham v. Wyeth Laboratories, 906 F.2d 1399, 1401 (10th Cir.), cert. denied, 111 S. Ct. 511 (1990).

Rule 60 (b) specifies six reasons or grounds for relief from a final judgement or order. Clauses (1) through (5) state the traditional grounds for relief. Clause (6) provides that the district court may grant relief for "any other reason justifying relief from the operation of the judgment." Thus, clause (6) is a catchall provision designed to cover unforeseen contingencies. As stated by Moore, "(i)t is intended to be a means for accomplishing justice in exceptional situations; and, so confined, does not violate the principle of finality of judgments." 7 Moore's Federal Practice, ¶ 60. 27[2] , p. 60-274 (2d ed. 1991). We have described Rule 60 (b)(6) as a " 'grand reservoir of equitable power to do justice in a particular case.' " Pierce v. Cook & Co., 518 F. 2d 720, 722 (10th Cir. 1975) (citation omitted), cert. denied, 423 U.S. 1079 (1976).

The law in this circuit is clear. A post-judgment change in the law or in the judicial view of an established rule of law does not justify relief under Rule 60 (b)(6). Collins v. City of Wichita, 254 F. 2d 837, 839 (10th Cir. 1958). In Pierce, this court, in an en banc decision, and in an unusual fact situation, created a limited exception to Collins: relief may be granted under Rule 60 (b) when the post-judgment change in the law arises out of the same accident as that in which the plaintiff was injured. Pierce, 518 F. 2d at 721, 723; Morris, 758 F. 2d at 1359. Any broader rule would judicially abolish the concept of finality in litigation and make every lawsuit winner vulnerable to additional litigation if and when the law is change. This vulnerability is made more significant when one realizes that a Rule 60 (b)(6) motion needonly be brought "within a reasonable time."

Plaintiff cites three cases as being contrary to Collins and Morris. The first of these, Professional Assets Management, Inc. v. Penn Square Bank, N.A., 616 F. Supp. 1418 (W.D. Okla. 1985), is a district court case and is not binding precedent upon this court. The remaining

two cases are Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F. 2d 696 (10th Cir. 1989), and Wilson v. Al McCord Inc., 858 F. 2d 1469 (10th Cir. 1988). In Wilson, which involved purchases of unregistered securities, the plaintiffs' issues were submitted to the trial court for ruling. Summary judgment was entered on some claims, directed verdicts on some, and jury verdicts on others. The plaintiffs then filed post trial motions. In Wilson, we granted relief based in part on a change in state law during the pendency of the appeal, stating it was the duty of the federal court " 'that still has jurisdiction of the case to conform its decision and judgment to the latest decision of the supreme court of the state.' " Id. at 1478 (citation omitted). In Adams, a group of investors sued for various security claims, and the defendant moved to compel arbitration. Defendant filed a Rule 60(b)(6) motion asking the district court to reconsider its order partially denying arbitration. These claims were still pending before the district court and no finality had attached to that judgment. We thus distinguish both of these cases in that the moving parties had presented their legal issues to the court for relief and had not wholly surrendered prosecution of its claims.

In the case before us, Plaintiff twice voluntarily dismissed his complaint without first seeking a judicial ruling upon his asserted issue of law. No judicial action was ever taken to adjudicate Plaintiff's claims, nor did Plaintiff ever request such action. We may only speculate as to Plaintiff's reasons therefor, but perhaps Plaintiff was unwilling to risk Oklahoma's law imposing attorney fees upon the loser in order to challenge Oklahoma's existing employment at-will doctrine. One cannot be critical of Plaintiff's decision. The fact remains, however, that Plaintiff twice sued Defendant upon a theory of law then unrecognized in Oklahoma and rather than pursue his effort to make new law, twice dismissed without giving the trial court the opportunity to rule upon his assertions. In short, Plaintiff twice made the tactical decision to abandon his efforts to change Oklahoma law and in both cases these tactical decisions were made prior to a court ruling upon the merits of his claim. As a result of these tactical decisions, nothing was pending before the trail court, nor had any appeals been timely filed.

Furthermore, while Oklahoma law regarding a public policy

exception to the employment at-will doctrine was somewhat unsettled, the same was not true for Plainiff's remaining claims of international infliction of emotional distress and breach of contract. These are recognized claims in Oklahoma. Plaintiff had the opportunity to litigate these claims and failed to do so. Plaintiff has not pointed to extraordinary circumstances that would justify rule 60(b)(6) relief concerning these two claims. Rule 60(b)(6) should not be used to relieve a party of the consequences of voluntary litigation choices or improvident tactical decisions. As stated by the United States Supreme Court:

> Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong considering the outcome of the Keilbar case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

Ackermann v. United States, 340 U.S. 193, 198 (1950). Plaintiff has pointed to nothing in the record that would suggest hat his dismissals were anything other than informed decisions made upon counsel's advice as to the state of employment law in Oklahoma.

As we review the judgment of the district court for an abuse of discretion, we have not been persuaded that the district court abused its discretion, we have not been persuaded that the district court abused its discretion in denying plaintiff relief under Rule 60(b)(6).

The judgment of the district court is therefore AFFIRMED.

Entered for the Court:

WADE BRORBY
United States Circuit Judge

The preceding Order and Judgment was filed in the United States Court of Appeals for the Tenth Circuit on September 18, 1991.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK SPROULL,

Plaintiff,

v.

UNION TEXAS PRODUCTS CORPORATION, d/b/a UNION TEXAS PETROLEUM, a Delaware corporation,

Defendant.

No. CIV-88-891-P

ORDER GRANTING MOTION TO BE SET ASIDE JUDGEMENT

Before the Court is a motion to set aside judgment pursuant to Fed. R. Civ. P. 60(b)(5) & (6) filed by Mark Sproull ("Sproull") on May 31, 1989. Union Texas Products, Corp. ("Union Texas") responded on June 23, 1989. For the reasons set forth below, Sproull's motion to vacate pursuant to Rule 60(b)(6) is hereby GRANTED.

I. BACKGROUND

Sproull originally filed his wrongful discharge complaint in this Court in December of 1987. Union Texas then filed a motion to dismiss, alleging that there was no cause of action for termination of an at will employee. Sproull then asked this Court to certify to the Oklahoma Supreme Court the question whether there was a cause of action based on public policy grounds as discussed in Hinson v. Cameron, 742 P.2d 549 (Okla. 1987), or, in the alternative, to stay the proceeding until the Oklahoma Supreme Court rendered a decision. This Court denied Sproull's request and instead granted Sproull an extension of time to respond to the motion to dismiss.

Sproull then voluntarily dismissed his action and filed a second action in state court. Union Texas had this action removed to this

Court, and Sproull then filed his second voluntary dismissal. This second voluntary dismissal operated as an adjudication on the merits. Fed. R. Civ. P. 41(a)(1). Subsequent to this dismissal, the Oklahoma Supreme Court decided Burk v. K- Mart Corp., 770 P.2d 24 (Okla. 1989), which provides a cause of action to wrongfully discharged employees based on public policy grounds.

II. STANDARD FOR VACATING A JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b)(6)

Because the Court finds a 60(b)(5) motion inapplicable in this case, the discussion will be confined to the 60(b)(6) motion. Fed. R. Civ. P. 60(b)(6) provides:

> On motion and upon such terms as are just, the Court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons . . . (6) any other reason justifying relief from the operation of the judgment.

In determining what reasons justify relief, a court is to exercise its discretion, using its "grand reservoir of equitable power" to liberally construe the rule so that justice will be served. Pierce v. Cook & Co., 518 F.2d 720, 72 2 (10th Cir 1975), cert. denied, 423 U.S. 1079 (1976). In order to grant relief, the circumstances must be "extraordinary," Id. at 723, or "exceptional." Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986); Ben Sager Chem. Internat'l v. E. Taragosz & Co., 560 F.2d 805, 809 (7th Cir. 1977); Hoffman v. Celebrezze, 405 F.2d 833, 835 (8th Cir. 1969).

III. FINDINGS AND ANALYSIS

A. Jurisdiction Of This Court To Grant 60(b)(6) Motion

One case from a district court of Alaska has held that a voluntary dismissal is a "proceeding" for 60(b) purposes. Noland v. Flohr Metal Fabricators, Inc., 104 F.R.D. 83, 86 (D.C. Alaska 1984). The Flohr court also said that it had found only two cases discussing jurisdiction to grant a 60(b) motion after a 41(a)(1) dismissal, but that courts generally consider 60(b) to be a remedy of 41(a)(1) dismissals without

F.R.D. at 86.

The Eastern District of California held that a 60(b) motion would be the appropriate remedy in a case where the plaintiff filed two "successive unilateral voluntary dismissals." Merrill Lynch, Pierce, Fenner & Smith v. Randall, 110 F.R.D. 499, 500 (E.D. Cal. 1986). The D.C. Circuit affirmed this view in Randall v. Merrill Lynch, 820 F.2d 1317 (D.C. Cir. 1987), cert. denied, 484 U.S. 1027 (1988). Although this case is from a different circuit, it is worth noting because it is factually like Sproull's case. In Randall, the plaintiff filed two voluntary dismissals where its case was twice removed to a different federal district court. Randall, 820 F.2d at 1319. The district court to which the case was transferred granted plaintiff's 60(b)(6) motion to vacate, and the D.C. Circuit affirmed, saying that the voluntary dismissals operated as a final judgment which is covered by 60(b) and that nothing in the language of Rule 60(b) exempts voluntary dismissals from the scope of the rule. Randall, 820 F.2d at 1320.

In the recent Tenth Circuit case of Smith v. Phillips, 881 F.2d 902 (10th Cir. 1989), the Tenth Circuit held that the District Court did not have jurisdiction to order the terms of a settlement agreement be made public following a Rule 41(a)(1)(ii) dismissal by stipulation. Smith, 881 F.2d at 905. In dictum, the court stated: "We agree with the Seventh Circuit that '[a]n unconditional dismissal terminates federal jurisdiction except for the limited purpose of reopening and setting aside the judgment of the dismissal within the scope allowed by [Fed. R. Civ. P.] 60(b).'" Id. at 904 (quoting McCall-Bey v. Franzen, 777 F.2d 1178, 1190 (7th Cir. 1985)). Thus, it seems that the Tenth Circuit considers a District Court to have jurisdiction to grant a Rule 60(b) motion after a unconditional dismissal is filed. However, Smith involved a Rule 41(a)(1)(ii) dismissal by stipulation rather than a Rule 41(a)(1)(i) voluntary dismissal like Sproull's. Smith, 881 F.2d at 905. While the two cases sre factually distinct, both dismissals represent adjudications of the merits. Id. at 904. Fed. R. Civ. P. 41 (a) (1) (ii). Rule 60 (b) allows a court to relieve a party from "a final judgment, order, or proceeding." Fed. R. Civ. P. 60 (b).

B. Extraordinary Circumstances Exist For Which This Court Should Grant Relief

In Collins v. City of Wichita, Kan., 254 F.2d 837 (10th Cir. 1958), the court held that a mere change of law or judicial view was not an "extraordinary circumstance" that justifies relief from a judgment. Id. at 839. However, the Western District of Oklahoma has since said that "[i]n this Circuit, relief under Rule 60(b) because of a change in precedent is directed to the trial court's discretion and considerations in equity." Professional Assets Management v. Penn Square Bank, 616 F. Supp. 1418, 1419 (W.D. Okla. 1985). Thus, a change in decisional law may be a basis for Rule 60(b) relief if a court, in its discretion, finds extraordinary circumstances that justify such relief.

In the case at bar, such extraordinary circumstances do exist. Sproull's motion to vacate his second voluntary dismissal is not based merely upon the change in judicial view created by Burk, but rather upon the hardship created by being forced to litigate in federal court after his request for certification or a stay was denied. Had Sproull's request been granted, his case likely would have had the benefit of Burk. Based upon Sproull's attempt at certification and his subsequent attempt to litigate his claim in state court, this Court finds that justice is best served by GRANTING Sproull's Rule 60(b)(6) motion to set aside the judgment of his second voluntary dismissal.

IV. CONCLUSION

For the reasons set forth above, Sproull's motion to set aside judgment of his second voluntary dismissal is GRANTED.

IT IS SO ORDERED THIS 19th DAY OF JANUARY, 1990.

LAYN R. PHILLIPS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK SPROULL,

Plaintiff,

V.

UNION TEXAS PRODUCTS CORPORATION, d/b/a UNION TEXAS PETROLEUM, a Delaware corporation,

Defendant.

No. CIV-88-891-P

ORDER VACATING ORDER OF JANUARY 19, 1990, AND UPON RECONSIDERATION DENYING PLAINTIFF'S MAY 31, 1989, MOTION TO BE SET ASIDE JUDGEMENT

Before the Court is defendant's motion for reconsideration and, alternatively, for certification of interlocutory appeal. Defendant filed its motion April 20, 1990, and plaintiff responded May 3, 1990.

A brief summary of the procedural history of this case will be helpful. Plaintiff first filed this wrongful discharge action in federal district court on December 12, 1987, and voluntarily dismissed it two months later, after the Court denied plaintiff's motion to certify a question to the Oklahoma Supreme Court. Plaintiff thereafter, on April 25, 1988, filed the same action in state district court, but again voluntarily dismissed it pursuant to Fed. R. Civ. P. 41(a), eight days after defendant removed the action to federal district court. Under Rule 41(a) the second voluntary dismissal operated "as an adjudication on the merits" and judgment was accordingly entered against plaintiff on May 31, 1988.

Exactly one year later, plaintiff filed a motion to set aside the May 31, 1988, judgment. Plaintiff based his motion upon a post-judgement change in the law in Oklahoma. Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989), which recognized a new cause of action for wrongful

discharge on public policy grounds.

On January 19, 1990, the Court granted plaintiff's motion to set aside the May 31, 1988, judgment. It is this January 19, 1990, order which defendant urges the Court to reconsider. Defendant, in its motion to reconsider, vigorously relies upon Morris v. Adams-Millis Corp., 758 F.2d 1352 (10th Cir. 1985). Neither party had previously directed the Court's attention to Morris, and the Court's January 19, 1990, order did not consider it. Had the parties timely brought this precedent to the attention of the Court, as they should have, this entire controversy might have been avoided.

In its January 19, 1990, order, the Court cited Collins v. City of Wichita Kansas, 254 F.2d 834 (10th Cir. 1958), which held that a mere change of law or change of judicial view of the law is not an "extraordinary circumstance" which justifies Rule 60(b)(6) relief from a judgment. However, the Court did not follow Collins. Instead, the Court followed a district court opinion, Professional Assets Management v. Penn Square Bank, 616 F. Supp. 1418, 1419 (W.D. Okla. 1985) (PAM v. PSB), which stated that a change in precedent is sufficient to warrant relief under Rule 60(b) in the trial court's discretion. In PAM v. PSB the district court discussed and rejected Collins, noting that a later Tenth Circuit decision, Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975), granted Rile 60(b)(6) relief when the state court decision underpinning the district court's decision had been expressly overruled by the Oklahoma Supreme Court. Thus, in its January 19, 1990, order, this Court relied upon PAM v. PSB and implicitly relied upon Pierce in granting Rule 60(b)(6) relief and in vacating the May 31, 1988, judgment.

However, Morris appears to be dispositive of the issue and compels this Court to reconsider. Morris clearly holds that "when the post-judgment change in the law did not arise in a related case" the change in law does not justify Rule 60(b)(6) relief. Id. at 1359 (emphasis added). Morris distinguished and limited the holding in Pierce. Morris pointed out that Pierce approved of granting Rule 60(b)(6) relief when the post-judgment change in the law arose out of the same accident as that in which the Pierce plaintiffs were injured, not when the post-judgement change in the law arose out of an

unrelated case. Thus, although Morris provides that "Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case" and "should be liberally construead when substantial justice will thus be served," id. at 1359 (citations omitted), the Court's power to grant Rule 60(b)(6) relief is far from unlimited and does not reach the circumstances present in the instant case. In the instant case the post-judgment change in law arose in a totally unrelated case, to wit: Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989).

Human nature being what it is, the Court's natural tendency is to give Mark Sproull his day in court now that the Oklahoma Supreme Court has recognized a cause of action for wrongful discharge on public policy grounds. However, judges are accountable for interpreting the law according to precedent and are not afforded the luxury of indulging in sympathetic tendencies. Thus, the Court concludes it must adhere to this circuit's precedent of Morris v. Adams-Millis Corp., 758 F. 2d 1352, 1359 (10th Cir. 1985).

Accordingly, defendant's motion to reconsider is GRANTED and upon reconsideration, the court ORDERS as follows:

1. The Order entered January 19, 1990, which granted plaintiff's May 31, 1989 motion to set aside the May 31, 1988, judgement against plaintiff is hereby VACATED.

2. Plaintiff's May 31, 1989, motion to set aside the May 31, 1988, judgment against plaintiff is hereby DENIED.

IT IS SO ORDERED THIS 3rd DAY OF AUGUST 1990.

LAYN R. PHILLIPS
UNITED STATES DISTRICT JUDGE

FEDERAL RULES OF CIVIL PROCEDURE
RULE 60

Rule 60. Relief From Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereaf ter while the appeal is pending may be so corrected with leave of the appellate court.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (I) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any re lief from

a judgment shall be by motion as prescribed in these rules or by an independent action.